

**A Subramanyam a/l Sannasy v SAC II Syed Alwi bin Syed
Hamid & Anor**

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-7 OF
2009(J)
ARIFFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND JAMES
FOONG FCJJ
12 NOVEMBER 2009

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*Administrative Law — Dismissal from service — Dismissal from police force,
whether wrongful — Letter of dismissal failed to mention reg 33 of the Public
Officers (Conduct and Discipline) Regulations 1993 — Whether failure*
D *occasioned procedural error affecting disciplinary proceedings*

*Administrative Law — Dismissal from service — Dismissal from police force,
whether wrongful — Letter of dismissal wrongly referred to reg 38 of the Public
Officers (Conduct and Discipline) Regulations 1993 — Whether reference to
wrong regulation under the Regulation vitiated letter of dismissal and rendered*
E *dismissal null and void — Whether reference to wrong regulation affected validity
of disciplinary authority's decision in imposing dismissal*

F *Public Servants — Dismissal — Dismissal of police officer — Letter of dismissal
failed to mention reg 33 of the Public Officers (Conduct and Discipline)
Regulations 1993 — Whether failure occasioned procedural error affecting
disciplinary proceedings*

G *Public Servants — Dismissal — Dismissal of police officer — Letter of dismissal
wrongly referred to reg 38 of the Public Officers (Conduct and Discipline)
Regulations — Whether reference to wrong regulation under the Regulation
vitiated letter of dismissal and rendered dismissal null and void — Whether*
H *affected validity of disciplinary authority's decision in imposing dismissal*

I The appellant, a police lance corporal, was convicted of an offence under
s 222 of the Penal Code and fined RM1,500 in default three months'
imprisonment. The appellant's head of department, pursuant to reg 33 of the
Public Officers (Conduct and Discipline) Regulations 1993 ('the
Regulations'), submitted a report to the disciplinary authority recommending
that the appellant be dismissed. The disciplinary authority subsequently
dismissed the appellant and informed him by letter ('the letter') that he had
been dismissed pursuant to reg 38(g) of the Regulations. The appellant's

application in the High Court for a declaration that his dismissal was wrong in law, null and void was dismissed. His appeal to the Court of Appeal was also dismissed, leading the appellant to appeal to the Federal Court. In the Federal Court, the appellant's counsel contended that: (i) the decision to dismiss the appellant was null and void as the disciplinary authority had wrongly invoked reg 38 of the Regulations; (ii) the failure to specifically state reg 33 in the letter rendered the letter of dismissal null and void and of no effect; (iii) the failure to specify paragraph (a) to reg 37(1) in the letter vitiated the said letter.

Held, dismissing the appeal with costs:

- (1) In the instant case, the procedure pursuant to reg 33 had been religiously adhered to by the appellant's head of department. The omission to mention reg 33 in the said letter could not be said to have occasioned a procedural error affecting the disciplinary proceedings against the appellant. There was no necessity to mention reg 33 in the letter since reg 33 was the only regulation under which the appellant's head of department could act in the circumstances (see para 14).
- (2) It was incomprehensible how the omission to mention para (a) of reg 37(1) could vitiate the letter. Further, the reference to reg 38 was mere surplus that did not constitute an error in jurisdiction or an absence of exercise of discretion (see para 16); *Isha Beevi v Tax Recovery Officer* (1975) SC 2135 followed.
- (3) The rights of the appellant in the instant appeal, were not at all affected by the reference made to reg 38 in the letter of dismissal. The letter showed that the disciplinary authority had acted under reg 37 in deciding to impose the punishment of dismissal. The appellant could not be said to be prejudiced when both regs 37 and 38 provided for dismissal as a punishment. The reference to reg 38 was out of context under the circumstances of the instant appeal but did not affect the validity of the decision of the disciplinary authority in imposing the dismissal (see para 19).

[Bahasa Malaysia summary]

Perayu, seorang pegawai polis berpangkat lans kopersal, disabitkan atas satu kesalahan di bawah s 222 Kanun Keseksaan dan dikenakan denda RM1,500 dan jika gagal membayar tiga bulan penjara. Ketua jabatan perayu, menurut peraturan 33 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan tersebut'), mengemukakan satu laporan kepada lembaga disiplin menyarankan bahawa perayu dipecat. Lembaga disiplin kemudiannya memecat perayu dan memberitahu perayu melalui surat ('surat tersebut') bahawa dia telah dipecat menurut peraturan 38(g) Peraturan tersebut. Permohonan perayu ke Mahkamah Tinggi untuk deklarasi bahawa

- A pemecatannya adalah salah di sisi undang-undang, batal dan tidak sah, ditolak. Rayuannya ke Mahkamah Rayuan juga ditolak, menyebabkan rayuannya ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, perayu menghujah bahawa: (i) keputusan untuk memecat perayu adalah batal dan tidak sah kerana lembaga disiplin telah secara salah mengguna pakai peraturan 38 Peraturan tersebut; (ii) kegagalan untuk menyatakan secara spesifik peraturan 33 di dalam surat tersebut menjadikan surat pemecatan tersebut batal dan tidak sah dan tidak mempunyai kesan; (iii) kegagalan untuk menyatakan dengan spesifik perenggan (a) peraturan 37(1) di dalam surat tersebut membatalkan surat tersebut.

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Diputuskan, menolak rayuan dengan kos:

- (1) Di dalam kes ini, prosedur menurut peraturan 33 telah dipatuhi dengan cermat oleh ketua jabatan perayu. Kegagalan menyatakan peraturan 33 di dalam surat tersebut tidak boleh dikatakan telah menyebabkan kesilapan prosedur yang menjejaskan prosiding tatatertib tersebut terhadap perayu. Tidak ada keperluan untuk menyebut peraturan 33 di dalam surat tersebut kerana peraturan 33 merupakan satu-satunya peraturan yang boleh digunakan oleh ketua jabatan perayu dalam keadaan sebegini (lihat perenggan 14).
- (2) Adalah tidak difahami bagaimana kegagalan untuk menyatakan perenggan (a) peraturan 37(1) boleh membatalkan surat tersebut. Selanjutnya, rujukan kepada peraturan 38 adalah tambahan semata-mata yang tidak menjadi kesilapan dalam bidang kuasa atau ketiadaan pelaksanaan budi bicara (lihat perenggan 16) *Isha Beevi v Tax Recovery Officer* (1975) SC 2135 diikuti.
- (3) Hak-hak perayu di dalam rayuan ini, tidak sepenuhnya terjejas oleh rujukan yang dibuat kepada peraturan 38 di dalam surat pemecatan tersebut. Surat tersebut menunjukkan bahawa lembaga disiplin bertindak di bawah peraturan 37 dalam menentukan untuk menjatuhkan hukuman pemecatan. Perayu tidak boleh dikatakan telah terjejas apabila kedua-dua peraturan 37 dan 38 memperuntukkan pemecatan sebagai hukuman. Rujukan kepada peraturan 38 adalah di luar konteks di dalam keadaan rayuan ini tetapi ia tidak menjejaskan kesahan keputusan lembaga disiplin dalam membuat pemecatan (lihat perenggan 19).]

I Notes

For a case on dismissal from police force, whether wrongful, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 6.
For cases on dismissal of police officer, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1912–1916.

Cases referred to

Isha Beevi v Tax Recovery Officer (1975) SC 2135 (folld)
Subramanian a/l Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor [2004]
4 MLJ 415, HC (refd)

Legislation referred to

Penal Code s 222
Public Officers (Conduct and Discipline) Regulations 1993 regs 33, 37,
37(1), (1)(a), (b), (c), 38, 38(g)
Rules of the High Court 1980 O 14A, O 33 r 2

Appeal from: Civil Appeal No J-01-50 of 2004 (Court of Appeal,
Putrajaya)

*Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the
appellant.*
*Nizam Zakaria (Shamsul Bolhassan with him) (Federal Counsel, Attorney
General's Chambers) for the respondents.*

Mohd Ghazali FCJ (delivering judgment of the court):

[1] The following questions were posed in this appeal, namely:

- (a) whether an error in a letter of dismissal stating a wrong regulation under the Public Officers (Conduct and Discipline) Regulations 1993 renders the letter of dismissal null and void and of no effect; and
- (b) whether mere specification of reg 37 together with reg 38(g) (which is undisputedly the wrong regulation) in a letter of dismissal pursuant to disciplinary proceedings initiated under reg 33 without mention of same in the letter of dismissal renders the letter of dismissal null and void and of no effect.

BACKGROUND

[2] The appellant was a lance corporal in the Royal Malaysian Police Force. He was charged in court with an offence under s 222 of the Penal Code, namely, he was alleged to have falsified documents to release three Indonesians detained from the police lock-up in Batu Pahat, Johor. He was convicted and fined RM1,500 in default three months imprisonment. He paid the fine but did not appeal against the sentence.

[3] Consequently, the appellant's head of department, pursuant to reg 33 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the said Regulations'), submitted a report to the disciplinary authority and

- A recommended that the appellant be dismissed. Regulation 33 of the said Regulations provides that where criminal proceedings against an officer result in his conviction, his head of department shall send a copy of the court's decision and his record of service to the appropriate disciplinary authority that has the power to impose punishment of dismissal or reduction in rank and shall recommend whether the officer should, inter alia, be dismissed or reduced in rank 'depending on the nature and seriousness of the offence committed in relation to the extent the officer has brought disrepute to the public service'.
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- C [4] On 20 August 2002, after considering the recommendation of the appellant's head of department and owing to the seriousness of the offence, the disciplinary authority decided to dismiss the appellant.
- D [5] By letter dated 26 August 2002, the disciplinary authority informed the appellant of its decision; that letter ('the said letter'), inter alia, reads:
- E 2. Pada menjalankan kuasa-kuasa tata tertib yang telah diwakilkan kepada Lembaga Tata tertib oleh Suruhanjaya Pasukan Polis mengikut PU(B) 441 bertarikh 14.12.2000, saya SAC II Syed Alwi bin Syed Hamid, Pengerusi Lembaga Tata tertib setelah meneliti fakta sabitan bersama-sama Ahli Lembaga Tata tertib serta syor Ketua Polis Daerah Batu Pahat selaras dengan kehendak Peraturan 37, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tata tertib) 1993 dengan ini memutuskan kamu dikenakan hukuman 'BUANG KERJA' di atas sabitan Mahkamah tersebut selaras di bawah Peraturan 38 (g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tata tertib) 1993.
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- G 3. Hukuman buang kerja terhadap kamu berkuatkuasa mulai 20.8.2002 iaitu tarikh mesyuarat Lembaga Tata tertib, Kontinjen Johor di bawah Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tata tertib) 1993.

HIGH COURT

- H [6] The appellant subsequently instituted this suit seeking a declaration that his dismissal from the police force was wrong in law, null and void and that he is still a police officer. In the High Court it was agreed by the parties that the claim be dealt with under O 33 r 2 and/or O 14A of the Rules of the High Court 1980. The issue for determination by the trial judge was whether the dismissal of the appellant vide the said letter is null and void.
- I [7] Before the trial judge, learned counsel for the appellant argued that the decision to dismiss the appellant was null and void as the respondents had wrongly invoked reg 38 of the said Regulations when they should have dismissed him under reg 37 of the same. As such, counsel contended there

has been an error in the process, namely, that there was procedural irregularity in the decision making process leading to the appellant's dismissal.

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[8] At the end of the day, the trial judge dismissed the suit with costs. In his judgment, since reported in the Malayan Law Journal (see *Subramanian all Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor* [2004] 4 MLJ 415), the trial judge said (at p 423):

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Upon evaluating the facts herein and the circumstances it is my considered view that there has not been any gross dereliction resulting in procedural unfairness to the plaintiff. The concept of 'procedural unfairness' is an extension of the principle of 'the right to be heard' and the court will have to look into the full circumstance of the case to ascertain whether the dismissal of the plaintiff is due to the unfair procedure against him. Procedural fairness to my mind much more than merely quoting the wrong section/provision of the law. Procedural unfairness must affect the rights of the plaintiff in that the right of the plaintiff is affected by the mistake in the legal provision. In short can it be said that the rights of the plaintiff is affected by the quoting of a wrong provision of the 1993 Regulations? The sentence of dismissal is provided in both regs 37 and 38, and in the circumstances herein it cannot be denied that before dismissing the plaintiff, the disciplinary authority had also taken into consideration reg 37. In the circumstances I cannot but agree with the submission of learned federal counsel, Puan Azizah Hj Nawawi that the doctrine of substantive fairness is applicable.

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[9] Later on in his judgment, the trial judge said (at pp 423–424):

In the light of the principle so established the plaintiff herein has not suffered any injustice over the decision to dismiss him under reg 38(g) instead of reg 37 of the 1993 Regulations. There is nothing in the affidavit of the plaintiff to show that he has been prejudiced by the misstatement of the regulations. Paragraph 6 of the 'afidavit jawapan' in encl 7 clearly shows that the recommendation of the Head of Department under reg 33 is that the punishment of dismissal be imposed on the plaintiff because of the criminal conviction. Further, the dismissal letter also shows that the disciplinary authority has duly considered the criminal conviction and the recommendations of the head of department before dismissing the plaintiff. Thus it is patently clear that intention of the disciplinary authority as per the recommendation of the Ketua Jabatan is to dismiss the plaintiff because of the criminal conviction.

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Since the sentence of dismissal is provided under both provisions, that is, regs 37 and 38(g) the end result would have been the same so that it could not be said that there was a real likelihood of him having suffered any prejudice. It follows that the dismissal for the plaintiff under reg 38(g) instead of reg 37 does not and cannot amount to procedural unfairness and/or procedural irregularity to the plaintiff to entitle him the relief prayed for, bearing in mind that the power of the court to grant a declaratory order is a discretionary power.

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[10] In conclusion, the trial judge said (at pp 425–426):

- A** ... Based on the said conviction, his case was referred to the disciplinary authority with a recommendation that he be dismissed from the police force. After considering the conviction and the recommendations of the head of department, the plaintiff was dismissed. The only error, if any, was that the plaintiff was dismissed under reg 38(g) of the 1993 Regulations instead of under reg 37. But as
- B** I have stated above in so doing, there has not been any miscarriage of justice because the powers of dismissal remain with the disciplinary authority.
- Having considered the totality of the case, the inevitable result is that the plaintiff will be dismissed and coupled with the fact that the disciplinary authority has the power to dismiss the plaintiff under reg 37 the mere mentioning of the wrong
- C** provision under which the dismissal was made cannot nullify the said decision.

COURT OF APPEAL

- D** [11] The appellant's appeal to the Court of Appeal was also dismissed with costs. In delivering the judgment of the court, Heliliah Mohd Yusof JCA (as she then was) said:
- E** ... In the instant appeal before us reg 33 is an enabling provision where it is incumbent on a head of department to submit a recommendation to the relevant disciplinary authority in a situation where an officer has been convicted as a result of criminal proceedings. The contents of the dismissal letter indicate that the disciplinary authority acted in furtherance of reg 37 that is the appropriate provision to impose the punishment of dismissal. It has also been submitted that reg 33 does not give the disciplinary authority the jurisdiction to convict the officer concerned and that where an officer is convicted under reg 33 only then reg 37
- F** applies. It is averred that the first respondent ought to have invoked the provisions of reg 37. Two observations may be made. Firstly an erroneous interpretation has been rendered to the dismissal letter on behalf of the appellant for as indicated above the dismissal letter has already made a specific reference to reg 37. Secondly the contention that the reference to reg 38 in the dismissal letter amounts to the disciplinary authority acting without jurisdiction is without merit. The scope of Regulations 1993 indicates that reg 33 is only one of the provisions where the disciplinary authority is emplaced in a position to determine what is the appropriate punishment to impose. Implicit in reg 33 is that conviction and sentence imposed by a court of law by itself constitutes a breach of the code of conduct or in effect a misconduct.
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- I** Regulations 1993 constitute the corpus of regulations promulgated to regulate the conduct and discipline of those serving in the public services. While reg 38 uses the term 'offence' and the words '... finds an officer guilty of contravening any of the provisions of these Regulations' it is in substance a general description that in the event of the violation of any conduct laid down which amounts to an offence the relevant disciplinary authority under reg 38 is generally vested with the power to exercise its discretion to make the appropriate determination on the form of punishment to be imposed befitting the circumstances of each contravention of the regulations. The question here is whether in its totality the disciplinary authority in this appeal has considered a matter and arrived at a decision in accordance with

the procedure laid down by the Regulations 1993. Our response is that it is in the affirmative. The appellant has also failed in his allegation that the disciplinary authority has not purportedly directed itself to appreciate directory or mandatory provisions found in the 1993 Regulations. In our view the reference to reg 38 is mere surplus that does not constitute an error in jurisdiction or an absence of exercise of discretion.

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THE APPEAL BEFORE THIS COURT

[12] In canvassing the appeal before this court, learned counsel for the appellant pointed out that reg 37 in the said letter 'does not avert to either limb (a), limb (b) or limb (c)' neither 'does it avert to reg 33(a)'. Counsel further pointed out that reg 37(1)(a) provides for punishment of dismissal if a public officer has committed an offence carrying a criminal conviction. He then argued that a public officer who has committed an offence carrying a criminal conviction cannot be punished under reg 38(g) and it has to be under reg 37(1)(a) and no other regulation. He further argued that the said letter 'contains regulations included therein which do not apply to the appellant's position' and that the purported action taken against the appellant pursuant to reg 37 'without specifying the limb therein and mention of regulation 38(g) under which he was dismissed is not on lawful authority'.

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[13] Based on the above premises, counsel submitted that:

- (a) the learned judges of the Court of Appeal were wrong in not concluding that the said letter was fatally flawed having regard to the mention of reg 38(g) of the said Regulations in it; and
- (b) the learned judges of the Court of Appeal misdirected themselves in holding that the reference to reg 37 of the said Regulations in the said letter did not render it void and inoperative despite no specific reference being made in it that it was reg 33 read with reg 37 under which the first respondent had dismissed the appellant from service.

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JUDGMENT OF THIS COURT

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[14] Only regs 33, 37 and 38 of the said Regulations are relevant in this appeal. The said letter clearly informed the appellant that the disciplinary authority received a report from his head of department stating that the appellant was convicted of an offence under s 222 of the Penal Code in the Magistrate's Court at Batu Pahat and the sentence imposed. This would denote that the procedure pursuant to reg 33 was religiously adhered to by the appellant's head of department. I cannot fathom how the omission to mention reg 33 in the said letter can be said to have occasioned a procedural error affecting the disciplinary proceedings against the appellant. I further

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A cannot see the necessity to mention reg 33 in the said letter as that was the only regulation under which the appellant's head of department could act under the circumstances.

B [15] With regards to dismissal as a punishment, reg 37(1) of the said Regulations read:

Where, after considering the report and the recommendation of the Head of Department forwarded in accordance with regulation 33 or 36, the appropriate Disciplinary Authority is of the opinion —

- C (a) *that the officer should be dismissed or reduced in rank, the Disciplinary Authority shall forthwith impose the appropriate punishment;*
- (b) that the officer should not be dismissed or reduced in rank but should be imposed with a lesser punishment, the Disciplinary Authority shall impose on the officer such lesser punishment as it deems fit and proper; or
- D (c) that the officer should not be impose with any punishment, the Disciplinary Authority shall so decide. (Emphasis added.)

E [16] Thus, reg 37(1) clearly provides that after considering the report and the recommendation of the head of department forwarded in accordance with, inter alia, reg 33, if the disciplinary authority is of the opinion that the officer should be dismissed, it shall forthwith impose that punishment. In the said letter the disciplinary authority did refer to reg 37. Dismissal is clearly a punishment that the disciplinary authority can impose, viz, under

F reg 37(1)(a). I cannot comprehend how the omission in mentioning para (a) of reg 37(1) can vitiate the said letter. Other than a reduction in rank as a punishment, dismissal as a punishment is only provided for in para (a) of reg 37(1); para (b) refer to the imposition of a lesser punishment other than dismissal or a reduction in rank and para (c) empower the disciplinary

G authority not to impose any punishment should it so decide. Consequently, I cannot fathom why the reference made in the said letter to reg 38(g) of the said Regulations, which in my view would be out of context under the circumstances, can be said to be tantamount to procedural unfairness. Regulation 38(g) reads:

H The appropriate Disciplinary Authority may, if it finds an officer guilty of contravening any of the provisions of these Regulations, and after having regard to the seriousness of the offence, impose upon the officer any one or any combination of two or more of the following punishments:

I (g) dismissal.

I would agree with the views expressed by Heliliah Mohd Yusof JCA in her judgment with regards to reg 38, namely, that 'the reference to reg 38 is mere surplus that does not constitute an error in jurisdiction or an absence of exercise of discretion'.

[17] In *Isha Beevi v Tax Recovery Officer* (1975) SC 2135, several objections were canvassed before the Kerala High Court one of which was that a wrong section of a provision of law was cited in an attachment order. That objection was overruled by the learned judge who relied upon 'the well established proposition that where the power to proceed is actually there, the mere reference to a wrong section for authority to act, will not vitiate the action taken'. In delivering the judgment of the Supreme Court, Beg J said (at p 2137):

It is not enough if a wrong section of the provision of law is cited in a notice or order if the power to proceed is actually there under another provision.

[18] The first question posed in the instant appeal presupposes that there was an error in the said letter, viz, that the reference made to reg 38 of the said Regulations was an error and hence would render the said letter null and void. The second question posed is whether mere specification to reg 37 in the said letter together with reg 38(g) 'which is indisputedly the wrong regulation' without mentioning reg 33 would render the said letter null and void and of no effect.

[19] I am of the view that the rights of the appellant, under the circumstances of the instant appeal, were not at all affected by the reference made to reg 38 in the said letter in imposing the punishment of dismissal. The said letter showed that the disciplinary authority acted under reg 37 in deciding to impose the punishment of dismissal. I cannot see how the appellant can be said to be prejudiced when both regs 37 and 38 provide for dismissal as a punishment. The reference made to reg 38 was out of context under the circumstances of the instant appeal but does not affect the validity of the decision of the disciplinary authority in imposing the punishment of dismissal. In my judgment the erroneous reference to the wrong regulation, namely, reg 38 instead of reg 37 of the said Regulations does not vitiate or invalidate the decision to dismiss the appellant. On the whole I am of the view that no injustice has been occasioned.

[20] Based upon the above premises, I answer both questions posed in the instant appeal in the negative. The appeal is hereby dismissed with costs. I would also make an order that the deposit be paid to the respondents on account of taxed costs.

[21] My learned brothers Arifin Zakaria CJ (Malaya) and James Foong Cheng Yuen FCJ have seen this judgment in draft and concurred with it. *Appeal dismissed with costs.*

Reported by Andrew Christopher Simon